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No. 975

In the Supreme Court of the United States

OCTOBER TERM, 1964

MARY W. COY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, who is presently employed as an Accounting Technician (Typing) GS–5 at the Lexington Army Depot, Lexington, Kentucky, brought this action against her three immediate superiors [1] in the Court of Claims, seeking to recover approximately $500 in back pay representing the difference in wages between a GS–5 position (which she now occupies) and a GS–7 (the grade to which she claims to be entitled). Petitioner alleged that her reassignment in

[1] Although the petitioner failed to name the United States (the only proper party defendant in the Court of Claims) as the defendant, the court below, as in earlier cases, overlooked the faulty pleading and treated the claim as one against the United States. See for example, *O'Leary* v. *United States*, 77 C. Cl. 635, 637; *Fox* v. *United States*, 145 C. Cl. 186, 187

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December 1959 from the position of an Accounting Technician, GS–5, to the new position (with the identical grade and salary) of Accounting Technician (Typing) GS–5—a reassignment which automatically cancelled her appeal of the classification of her then current job to the Regional Office of the Civil Service Commission—deprived her of "a promotion when others in her office with less service and what appeared to be, lesser duties were being promoted above her" (R. 7).[2]

The Court of Claims, in a *per curiam* order, granted the government's motion for summary judgment and dismissed the petition on July 8, 1964 (Pet. App. 1a). A timely petition for reconsideration was denied on October 16, 1964 (Pet. App. 2a).

The Court of Claims was clearly correct in dismissing this petition. The real question presented is why this employee did not receive a promotion (Pet. 5, 7). However, there is no statute which requires the promotion of all employees, and it is well settled that the courts will not interfere with the internal management of the executive branch and the appointment and promotion of its employees. *Keim* v. *United States,* 177 U.S. 290, 295, 296; *Ramspeck* v. *Trial Examiners Conf.,* 345 U.S. 128, 138; *Powell* v. *Brannan,* 196 F. 2d 871, 873 (C.A.D.C.); *Nash* v. *Interstate Commerce Commission,* 225 F. 2d 42, 43 (C.A.D.C.), certiorari denied, 350 U.S. 953; *Coleman* v. *United States,* 100 C. Cl. 41, 43.

[2] "R." refers to the petition filed with the Court of Claims. "Pet. App." refers to the Appendix to the Petition for Certiorari filed with this Court.

Petitioner's argument that her reassignment and the concomitant withdrawal of her then pending classification appeal constituted a violation of the employer's duty to render her "fair impartial treatment" is without substance (Pet. 2–4). The Civil Service Regulations provide that an employing agency has the right to reassign its employees to other positions within that agency. 5 C.F.R. § 335.102(a). No suggestion has ever been made that Congress has restricted that essential right of management.

Moreover, petitioner ignores the fact that she herself never exhausted the available internal remedies. It is true that at the time of the December reassignment an appeal as to the classification of her position as Accounting Technician GS–5 was pending and this reassignment to Accounting Technician (Typing) GS–5 cancelled the prior appeal. 5 C.F.R. § 511.609 (c). However, on reassignment, petitioner had the right to file a new appeal with respect to the classification of her new position under 5 C.F.R. § 511.603 (a); this she failed to do.

Furthermore, even if the position had been reclassified to a higher grade, petitioner would still be without a cause of action since she had not been appointed to the higher position. Her only appointment had been to the position and grade entitling her to receive a GS–5 salary. A government employee is entitled only to the salary of the position to which he is appointed, regardless of the duties he actually performs. *United States* v. *McLean,* 95 U.S. 750; *Coleman* v. *United States,* 100 C. Cl. 41; *Dvorkin* v. *United*

States, 101 C. Cl. 296, 297, certiorari denied, 323 U.S. 730; *Baehr* v. *United States*, 157 C. Cl. 943, certiorari denied, 371 U.S. 888.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1965.

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